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Robert R. Corbin

March 10, 1988

Mr. A. Dean Pickett  
Mangum, Wall, Stoops & Warden  
222 East Birch Avenue  
P.O. Box 10  
Flagstaff, Arizona 86002

Re: I88-037 (R88-014)

Dear Mr. Pickett:

Pursuant to A.R.S. § 15-253(B) this office has reviewed the opinions expressed in your January 18, 1988 letter to Bill Williams, Superintendent of the Flagstaff Public Schools, and concurs with your conclusions that a district must exclude non-immune employees as well as students from school during outbreaks of measles or rubella; a district may, by policy or contract, permit employees to utilize sick leave or other types of leave during the period a non-immune person is excluded from work; employees have no legal right, absent contract or school policy, to be compensated when excluded from work during these outbreaks.

Sincerely,



BOB CORBIN  
Attorney General

BC:TLM:pnw

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EDUCATION OPINION

ISSUE NO LATER THAN

3-22-88

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January 18, 1988

Mr. Bill R. Williams  
Superintendent  
Flagstaff Public Schools  
701 North Kendrick  
Flagstaff, Arizona 86001

R88-014  
1/24/88  
Martin

Re: Request for Opinion Concerning  
Mandatory Absence for Lack of  
Measles/Rubella Immunity

Dear Mr. Williams:

You have requested this firm's opinion in response  
to the following question:

In light of current regulations of the  
Arizona Department of Health Services  
requiring the exclusion of persons (including  
employees) from schools upon the occurrence  
of an "outbreak" of measles or rubella, are  
the employees of the school district required  
to be paid full salary and benefits during  
mandatory exclusion?

As will be discussed in greater detail below, it  
is our opinion that the result is dependent upon employment  
policies adopted by the governing board, and that if such  
policies provide that exclusion under the circumstances to  
be discussed below is to be without pay and benefits, such  
policies will control.

As noted in the text of the question you  
presented, the Arizona Department of Health Services has  
adopted new regulations with respect to communicable  
diseases, found in ACRR R9-6-101, et seq. These  
regulations, effective this year, provide for the exclusion  
of non-immune persons from schools (as well as day care  
centers and preschools) during an outbreak of either measles  
(R9-6-729.D) or rubella (R9-6-742.C). The term "outbreak"  
is defined at R9-6-106 (13) as "a sudden rise in incidence  
of a disease."

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In the case of measles, immunity, according to R9-6-729.E.1.a is established by:

- i. A record of immunization against measles with a live virus vaccine given on or after the first birthday; or
- ii. A statement signed by a licensed physician, or a State or local health officer which affirms serologic evidence of having had measles.

Further, anyone born prior to January 1, 1957, is considered to be immune to measles by Subparagraph B of this section.

Similarly, immunity to rubella is established by R9-6-742.D.1 by either (a) a record of immunization against rubella given on or after the first birthday, or (b) a statement signed by a licensed physician, or a State or local health officer which affirms serologic evidence of having had rubella.

The predecessor to these current regulations was interpreted in the very recent opinion of the Arizona Court of Appeals in Maricopa County Health Department v. Harmon, \_\_\_ Arizona \_\_\_, \_\_\_ P.2d \_\_\_ (1CA-CIV 9050, October 8, 1987). The case involved a measles outbreak at an elementary school in the Mesa School District where children who could not show evidence of immunity were excluded by order of the Maricopa County Health Department. The exclusion was upheld in the face of numerous challenges, the Court of Appeals holding that (1) a school district-wide exclusion order was within the authority of the Health Department even without proof of an outbreak at each school, (2) more restrictive orders from the local Health Department than those contemplated at the State level were permissible, (3) it was unnecessary to require proof by blood test of a case of measles before imposing the exclusion order, (4) exclusions did not violate the student's fundamental right to a public education under the Arizona Constitution, and (5) although procedurally these issues were not properly before the Court of Appeals, the Court also opined that the exclusion order did not violate students' rights to either privacy or freedom of religion.

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We believe these same principles control the determination as to whether school district employees may properly be excluded under the above cited Department of Health Services regulations. Although the threshold question of whether the exclusion may be imposed is not the major thrust of your inquiry, it appears that the regularity of the Department of Health Services regulations read in light of the opinion of the Court of Appeals as described above makes it clear that not only pupils, but also employees, under the newly amended regulations, would, if unable to establish immunity to measles or rubella by evidence of vaccination, proof of having had the disease, or by being over the requisite age, be required to be excluded from a school setting for the indicated period.

The more specific question which you have asked, of course, focuses upon whether a school district is compelled to retain a district employee on full pay and benefits during the period of time that the employee is excluded under the above regulations as a result of an outbreak of measles or rubella at the work site where the person is employed. It is our opinion that this becomes a matter of the governing board's authority to contract with its employees for services to be rendered in accordance with A.R.S. §15-502.A.

That section provides as follows:

"The governing board may at any time employ and fix the salaries of teachers, principals, janitors, attendance officers, school physician, school dentist, nurses and other employees necessary for the succeeding year. The governing board may provide for employee fringe benefits, including sick leave, personal leave, vacation and holiday pay, jury duty pay, merit pay, pay bonuses and other benefits. A contract for the next ensuing school year includes only the employee fringe benefits which the governing board adopts for the next ensuing school year before it offers the contract."

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The method by which the fringe benefit policies of a governing board form a part of a contract most often is the adoption of policies of the governing board. "The terms of a teacher's contract may also include the rules and regulations of the school district." *Haverland v. Tempe Elementary School District*, No. 3, 122 Ariz. 487, 595 P.2d 1032 (App.1979). Op.Atty.Gen. 184-097.

Inherent in the contract of employment between a teacher or other district employee and the district itself is the requirement for mutual consideration, i.e.: salary in return for services rendered. The provisions of Article 9, Section 7 of the Arizona Constitution come into play here, where they prohibit the State and any subdivision of the State [including school districts] from making any donation or gift to any individual. These provisions have been interpreted in numerous opinions of the Attorney General, and in an opinion addressing the payment of leave benefits to teachers who had exhausted accumulated sick leave under a governing board's policies, the Attorney General opined in Op.Atty.Gen. 78-158 that a continuation of pay after exhaustion of accumulated sick leave would have to be "predicated upon the teacher's continuously rendering, during the extended sick leave period, one of the four types of services described [all assumed to be equivalent in value to salary received]" for payment to constitute a salary rather than a gift in violation of Article 9, Section 7.

This complements Op.Atty.Gen. 71-4 dealing with the question of payment of teacher's salaries while summoned for jury duty. In this opinion, closely analogous because the teacher obviously would not be providing teaching services during days when serving with the jury, the Attorney General held that "we wish to emphasize that payment of money to the teacher for days lost while serving on jury duty is not mandatory. It is a matter which the school may negotiate with its teachers, but no teacher or other employee has any statutory right to this."

It is thus our opinion, in the absence of any school district policies which, as part of the contract of employment, would provide for sick leave benefits to be available for teachers or other employees who were excluded for lack of immunity to measles or rubella, that a payment of salary to such teachers during such period of

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absence, with no services being rendered for the school district at such a time, would be an unlawful gift of public funds under Article 9, Section 7 of the Arizona Constitution.

The reference above to the policies of the governing board effectively becoming part of the contract of employment comes into play here. As noted, we believe that the Arizona Constitution would prohibit payment during a mandated absence for lack of immunity to measles or rubella. The opinion in *Haverland, supra*, not only notes that Board policies can become part of the contract of employment, but also that State laws, and of course the Arizona Constitution, can as well. *Haverland, supra*, 122 Ariz. at 489. We believe this would also include the inclusion within employee contracts of regularly adopted regulations affecting work site activity, including the above quoted regulations of the Arizona Department of Health Services affecting who may be present on school premises under the conditions described above.

We thus believe that the employees' contract would include and require application of Article 9, Section 7 of the Arizona Constitution, the Department of Health Services regulations concerning exclusions for lack of immunity to measles and rubella, and any pertinent Board policies which further describe how a district is to implement its obligation to comply with both the Constitution and the Department of Health Services regulations.

We advise that it would be prudent to adopt a policy specifically requiring adherence to the Department of Health Services regulations, not only for pupils but for employees as well, and further providing that mandated absences due to lack of immunity will occur without payment of salary, to avoid the payment of funds as an unlawful gift where no services will be rendered in return.

In light of the above Attorney General's Opinions, it also our belief that a school district may, but is not required to, adopt policies which may permit the use of accumulated sick leave, personal leave or similar benefits when mandatory exclusion is required. This would be a matter of discretion with the governing board of the school district as to whether it wished to permit sick leave or related benefits to be used in such an event.

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Further, because the requirements of the Arizona Constitution and the Department of Health Services Regulations effectively form a part of the contract between each employee and the district, we do not view a mandatory exclusion to be constrained by the provisions of A.R.S. §15-539 setting forth procedural steps to accomplish a suspension without pay. We believe the procedural due process requirements to effect a suspension without pay are mandated for matters which involve the taking of contracted-for salary and benefits. Because, as a matter of law, payment may not occur (absent a policy to permit such payment as a leave benefit) where services are not to be rendered, it is our opinion that the due process and other requirements found in Section 15-539 need not be observed where absence from the work site is mandated as a matter of law for lack of immunity to measles or rubella.

Please advise if we can be of any further assistance in this matter. We are forwarding a copy of this opinion to the Attorney General for his review.

Yours very truly,

MANGUM, WALL, STOOPS & WARDEN



A. Dean Pickett

ADP:sb  
cc: Bob Corbin, Esq.